90-495

No. _____

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. Tom Carden, et al.*, ___ F. 2d ___, rehearing denied, August 2, 1990, is in conflict with this Court's decision in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157 (S. Ct. 1914).

2. Whether a Federal Court may maintain jurisdiction of an intervention in a case in which the original claim was dismissed for lack of diversity jurisdiction by treating the intervention as an independent action.

3. Whether a Federal Court may treat an intervention as an independent action in the absence of service of process thereon as required by *Rule 4* of the *Federal Rules of Civil Procedure.*

4. Whether the Court of Appeals may properly treat an intervention as an independent action in a case dismissed for lack of diversity jurisdiction of the original claim when the District Court did not exercise its discretion to treat the intervention as an independent action, but tried the intervention as an ancillary matter in the original civil action in the erroneous belief that it possessed diversity jurisdiction to hear the original civil action.

STATEMENT OF PARTIES

Pursuant to Rule 14.1 (b) counsel for petitioner certifies that the following named persons are parties to the proceeding in the Court of Appeals for the Fifth Circuit review of whose judgment petitioner seeks:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Dr. John Hagan;
(20) Leo Hallack;
(21) Robert E. Harmon;
(22) Richard L. Harmon;
(23) Earl Hoatson;
(24) Andrew Kaufman;
(25) Dr. Allen Parelman;
(26) Bill Kryger;
(27) L V A Partnership;
(28) Dr. Richard Lynch;
(29) McFadin Partnership;
(30) John Mc Keever;
(31) Percy Mc Kinley;
(32) Nat N. Nast;
(33) Dr. John Pawsat;
(34) Henry Rankin;

STATEMENT OF PARTIES – Continued

(35) David Russell;

(36) Robert Samson;

(37) Dr. Daniel Scharf;

(38) Robert Schneider;

(39) Robert Eltonhead;

(40) Dennis Swan;

(41) Dick Gibson;

(42) Larry Shultz;

(43) Keith Shultz;

(44) Elton Shannon;

(45) Ernest Staub;

(46) Frances Swan;

(47) John Sullivan;

(48) John Symon;

(49) David Wharton;

(50) Dale Williams;

(51) Dr. Robert Doering; and

(52) Jim Veselich.

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No. _____

In The

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October Term, 1990

MAGEE DRILLING COMPANY,

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ARKOMA ASSOCIATES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Magee Drilling Company, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this cause.

DECISION TO BE REVIEWED

Petitioner seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in

Arkoma Associates v. C. T. Carden, et al. Nos. 87-3624, and 87-3917, June 26, 1990.

The decision is set forth in the Appendices.

OTHER DECISIONS RENDERED IN THE CASE

The following decisions were rendered in this case prior to that review of which is sought, to wit:

(1) *Carden, et al. v. Arkoma Associates,* 494 U. S. ___, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (S. Ct. 1990);

(2) *Arkoma Associates v. C. T. Carden, et al.,* 874 F. 2d 226 (5th Cir. 1989); and

(3) *Arkoma Associates v. C. T. Carden, et al.,* No. 86-9201 (5th Cir. 1986)

These opinions are set forth in the Appendices.

GROUNDS FOR JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit in this case was rendered on June 26, 1990, and rehearing was denied on July 23, 1990. This petition for a writ of certiorari was filed within ninety days of the date of entry of the Court of Appeals' opinion.

Jurisdiction of this Court is predicated upon *28 U. S. C. 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented by this petition involve the following constitutional and statutory provisions of the United States:

> *United States Constitution, Article III Section 2* provides:
>
> The judicial Power shall extend to all Cases in Law and Equity . . . between citizens of different States. . . .
>
> *28 U. S. C. 1332(a)* provides:
>
> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs, and is between –
>
> (1) citizens of different States; . . .

STATEMENT OF THE CASE

Respondent, Arkoma Associates, a purported Arizona limited partnership (hereafter "Arkoma"), invoking the diversity jurisdiction of the District Court, filed this suit against C. T. Carden and Leonard L. Limes (hereafter "Carden/Limes") as the guarantors of the performance of petitioner, Magee Drilling Company, a Texas corporation (hereafter "Magee") and lessee of an equipment lease entered into with Arkoma as lessor. In that one of Arkoma's purported limited partners was a citizen of Louisiana as were Carden/Limes, a motion to dismiss for lack of diversity jurisdiction was filed. The District Court denied the motion to dismiss, but certified the issue to the Court of Appeals for the Fifth Circuit (hereafter

"Court of Appeals") for interlocutory appeal. The Court of Appeals declined to consider the interlocutory appeal. Magee then, by motion, intervened as a defendant and filed a counterclaim asserting a cause of action pursuant to the *Texas Deceptive Trade Practices/Consumer Protection Act* (hereafter "DTPA"). Service of the intervention in accordance with *Rule 4* of the *Federal Rules of Civil Procedure* was not effected. Rather, the intervention was effected by motion with notice to Arkoma by mail.

The case was tried on the merits before the District Court sitting without a jury, and resulted in a judgment against Carden/Limes in favor of Arkoma. Carden/Limes's counterclaim, and Magee's DTPA claim were dismissed. The Court of Appeals, finding diversity jurisdiction existed on the basis of the citizenship of Carden/Limes and Arkoma, affirmed the judgment of the District Court (874 F. 2d 226). Carden/Limes and Magee's application for certiorari to the Supreme Court was granted, and resulted in the dismissal of Arkoma's claim against Carden/Limes for lack of diversity jurisdiction because of the identity of citizenship existing among Carden/Limes and a limited partner of Arkoma. Magee's DTPA claim was remanded to the Court of Appeals for consideration of jurisdiction to hear such claim. This Court's opinion appears in the Appendix at page A-1.

On June 26, 1990, the Court of Appeals rendered judgment finding that diversity jurisdiction existed insofar as Magee's intervention was concerned in that Magee was a Texas citizen and no member of Arkoma possessed Texas citizenship. The Court of Appeals affirmed the District Court's dismissal of Magee's DTPA claim.

Rehearing was denied by the Court of Appeals on July 23, 1990, and this application for certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of this Court in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914).

2. The decision of the Court of Appeals is in conflict with its decision in *Kendrick v. Kendrick*, 16 F. 2d 744 (5th Cir. 1927) which established a consistent line of jurisprudence unbroken until the decision rendered in this case. See *Truvillion v. King's Daughter's Hospital*, 614 F. 2d 530 (5th Cir. 1980); *Non Commissioned Officers Association of the United States of America, et al. v. Army Times Publishing Company*, 637 F. 2d 372 (5th Cir. 1981); and *Harris v. Amoco Production Co.*, 768 F. 2d 669 (5th Cir. 1985).

ARGUMENT

MAY IT PLEASE THE COURT:

Magee's intervention was not a continuation of this case by Magee after dismissal or settlement of the original principal action over which the District Court had jurisdiction, as occurred in the case relied on by the Court of Appeals, *Hunt Tool Co. v. Moore, Inc.*, 212 F. 2d 685 (5th Cir. 1954). Rather, this case was tried on the merits after

the Court of Appeals erroneously found, when it refused to hear Carden/Limes's interlocutory appeal, that diversity of citizenship existed among Carden/Limes and Arkoma. Magee's intervention was tried as an ancillary matter appended to the main demand. Therefore, the fate of the intervention must abide the disposition of the main demand. Such was the holding of this Court in *United States upon the Relation and for the Use and Benefit of Texas Portland Cement Company v. McCord*, supra, to wit:

> These rights to intervene and to file a claim, conferred by the statute, presupposes an action duly brought under its terms. . . .
>
> Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

Jurisdiction based on alleged diverse citizenship among Arkoma and Carden/Limes was the only jurisdiction invoked in the District Court. This was not a case in which the trial Judge exercised discretion to try the intervention as a separate suit after settlement or dismissal of the original action Rather, the intervention was allowed and tried *after* the Court of Appeals found jurisdiction where none existed. Had the Court of Appeals held otherwise when the matter was before it on interlocutory appeal, and had the District Court then sought to hear the intervention independently, there would have been before the Court of Appeals the issue of the propriety of

the exercise of discretion by the District Court. In the context of these proceedings, however, the District Court never turned its mind to independently hearing the intervention nor had it ever the opportunity to do so in light of the finding of diversity jurisdiction by the Court of Appeals. -

The Court of Appeals has recognized the principle of *McCord* in a line of cases dating back to 1927, unbroken save for the decision review of which is the subject of this application for certiorari. In *Kendrick v. Kendrick,* 16 F. 2d 744 (5th Cir. 1927) the Court of Appeals held that:

> An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third party is permitted to make himself a party. . . .

The *Kendrick* decision has been followed by the Court of Appeals in *Truvillion v. King's Daughter's Hospital,* 614 F. 2d 530 (5th Cir. 1980); *Non Commissioned Officers Association of the United States of America, et al. v. Army Times Publishing Company,* 637 F. 2d 372 (5th Cir. 1981); and *Harris v. Amoco Production Co.,* 768 F. 2d 669 (5th Cir. 1985). In *Truvillion,* the Court of Appeals held that:

> A different case is presented, however, when the earlier suit brought by the E. E. O. C. was jurisdictionally or procedurally defective. There is no right and no obligation to intervene in a defective suit. As we said in 1926,'[a]n existing suit is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit' . . . Whether the right to intervene is permissive or unqualified cannot affect the application of this rule.

Alternatively, in that service of Magee's intervention in accordance with *Rule 4* of the *Federal Rules of Civil Procedure* was not made, the District Court was precluded from treating the intervention as an original suit as this Court held in *McCord*, supra.

CONCLUSION

The decision of the Court of Appeals in this case conflicts with that of this Court in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, supra. Petitioners therefore pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 88-1476

C.T. CARDEN, ET AL., PETITIONERS *v.*
ARKOMA ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 27, 1990]

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties.

I

Respondent Arkoma Associates (Arkoma), a limited partnership organized under the laws of Arizona, brought suit on a contract dispute in the United States District Court for the Eastern District of Louisiana, relying upon diversity of citizenship for federal jurisdiction. The defendants, C. Tom Carden and Leonard L. Limes, citizens of Louisiana, moved to dismiss, contending that one of Arkoma's limited partners was also a citizen of Louisiana. The District Court denied the motion but certified the question for interlocutory appeal, which the Fifth Circuit declined. Thereafter Magee Drilling Company

intervened in the suit and, together with the original defendants, counterclaimed against Arkoma under Texas law. Following a bench trial, the District Court awarded Arkoma a money judgment plus interest and attorney's fees; it dismissed Carden and Limes' counterclaim and as well as Magee's intervention and counterclaim. Carden, Limes, and Magee (petitioners here) appealed and the Fifth Circuit affirmed. 874 F.2d 226 (1988). With respect to petitioners' jurisdictional challenge, the Court of Appeals found complete diversity, reasoning that Arkoma's citizenship should be determined by reference to the citizenship of the general, but not the limited, partners. We granted certiorari. 490 U.S. ___ (1989).

II.

Article III of the Constitution provides, in pertinent part, that "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States." Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. In its current form, the diversity statute provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $50,000 . . . , and is between . . . citizens of different States . . . . " 28 U.S.C.A. § 1332(a) (Oct. 1989 Supp.). Since its enactment, we have interpreted the diversity statute to require "complete diversity" of citizenship. See *Strawbridge v. Curtiss*, 3 Cranch 267 (1806). The District Court erred in finding complete diversity in this case unless (1) a limited partnership may be considered in its own right a "citizen" of the State that created it, or (2) a federal court must look to the citizenship of

only its general, but not its limited, partners to determine whether there is complete diversity of citizenship. We consider these questions in turn.

A

We have often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction. The precise question posed under the terms of the diversity statute is whether such an entity may be considered a "citizen" of the State under whose laws it was created.[1] A corporation

---

[1] The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,' " but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." *Post*, at 1 (emphasis added). Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because [a]ll *other parties*, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse." *Ibid.* (emphasis added).

That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy" test. There are *not*, as the dissent assumes, multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be

(Continued on following page)

is the paradigmatic artificial "person," and the Court has considered its proper characterization under the diversity statute on more than one occasion – not always reaching the same conclusion. Initially, we held that a corporation "is certainly not a citizen," so that to determine the existence of diversity jurisdiction the Court must "look to the character of the individuals who compose [it]." *Bank of United States v. Deveaux*, 5 Cranch 61, 86, 91-92 (1809). We overruled *Deveaux* 35 years later in *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 558 (1844), which held that a corporation is "capable of being treated as a citizen of [the State which created it], as much as a natural person." Ten years later, we reaffirmed the result of *Letson*, though on the somewhat different theory that "those who use the corporate name, and exercise the faculties conferred by it," should be presumed conclusively to be citizens of the corporation's State of incorporation. *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 329 (1854).

While the rule regarding the treatment of corporations as "citizens" has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities. For example, in *Chapman v. Barney*, 129 U.S. 677 (1889), a case involving an unincorporated "joint stock company,"

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determined – which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artificial entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes. See *infra*, at 7-10.

we raised the question of jurisdiction on our own motion, and found it to be lacking:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact the allegation is, that the company is *not* a corporation, but a joint stock company – that is, a mere partnership." *Id.* at 682.

Similarly, in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), we held that a "limited partnership association" – although possessing "some of the characteristics of a corporation" and deemed a "citizen" by the law creating it – may not be deemed a "citizen" under the jurisdictional rule established for corporations. *Id.*, at 456. "That rule must not be extended." *Id.*, at 457. As recently as 1965, our unanimous opinion in *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, reiterated that "the doctrinal wall of *Chapman v. Barney*," *id.*, at 151, would not be breached.

The one exception to the admirable consistency of our jurisprudence on this matter is *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), which held that the entity known as a *sociedad en comandita*, created under the civil law of Puerto Rico, could be treated as a citizen of Puerto Rico for purposes of determining federal court jurisdiction.

The *sociedad*'s juridical personality, we said, "is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." *Id.*, at 482. Arkoma fairly argues that this language, and the outcome of the case, "reflec[t] the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship." Brief for Respondent 14. The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*. There, in reaffirming "the doctrinal wall of *Chapman v. Barney*," we explained *Russell* as a case resolving the distinctive problem "of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U.S., at 151. There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships." 288 U.S., at 480.[2]

---

[2] The dissent correctly observes that "*Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction." *Post*, at 11. Rather, as is evident from our discussing the case here instead of in Part B below, *Russell*

(Continued on following page)

Arkoma claims to have found another exception to our *Chapman* tradition in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980). That case, however, did not involve the question whether a party that is an artificial entity other than a corporation can be considered a "citizen" of a State, but the quite separate question whether parties that were undoubted "citizens" (viz., natural persons) were the real parties to the controversy. The plaintiffs in *Navarro* were eight individual trustees of a Massachusetts business trust, suing in their own names. The defendant, Navarro Savings, Association, disputed the existence of complete diversity, claiming that the trust beneficiaries

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(Continued from previous page)

(according to respondent) tells us something about whether an artificial entity other than a corporation can be considered a "citizen" in its own right. That "[t]he issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico," *post*, at 10, does not affect *Russell*'s arguable relevance to that question because the operative word in both the diversity statute and the removal statute at issue in *Russell* is "citizens."

The dissent goes on to criticize as "seriously flawed," *post*, at 11, our attempt to distinguish *Russell* in connection with the issue we do address, whether a partnership can be considered a "citizen." We point out, not by way of complaint but to prevent confusion, that the criticism is gratuitous, inasmuch as the dissent itself takes no position on this issue, announcing at the very outset that it "do[es] not consider" the question "whether the limited partnership is a 'citizen.' " *Post*, at 1. In any event, the dissent's evidence bearing on the historical pedigree of partnership comes to our attention at least 25 years too late. For the reasons stated in the text, *Bouligny* considered and rejected applying *Russell* beyond its facts.

rather than the trustees were the real parties to the controversy, and that the citizenship of the former and not the latter should therefore control. In the course of rejecting this claim, we did indeed discuss the characteristics of a Massachusetts business trust – not at all, however, for the purpose of determining whether the trust had attributes making it a "citizen," but only for the purpose of establishing that the respondents were "active trustees whose control over the assets held in their names is real and substantial," thereby bringing them under the rule, "more than 150 years" old, which permits such trustees "to sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.*, at 465-466. *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to respondent the argument by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also it should be taken into account for purposes of determining whether an artificial entity is a citizen. That argument is, to put it mildly, less than compelling.

B

As an alternative ground for finding complete diversity, Arkoma asserts that the Fifth Circuit correctly determined its citizenship solely by reference to the citizenship of its general partners, without regard to the citizenship of its limited partners. Only the general partners, it points out, "manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts," and, more broadly, "have exclusive and complete

management and control of the operations of the partnership." Brief for Respondent 30, 36. This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization (for which one could at least point to *Russell*). We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.

To support its approach, Arkoma seeks to press *Navarro* into service once again, arguing that just as that case looked to the trustees to determine the citizenship of the business trust, so also here we should look to the general partners, who have the management powers, in determining the citizenship of this partnership. As we have already explained, however, *Navarro* had nothing to do with the citizenship of the "trust," since it was a suit by the trustees in their own names.

The dissent supports Arkoma's argument on this point, though, as we have described, under the rubric of determining which parties supposedly before the Court are the real parties, rather than under the rubric of determining the citizenship of the limited partnership. See n. 1, *supra*. The dissent asserts that "[t]he real party to the controversy approach," *post*, at 4 – by which it means an approach that looks to "control over the conduct of the

business and the ability to initiate or control the course of litigation," *post*, at 7 – "has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations." *Post*, at 4. Not a single case the dissent discusses, neither old nor new, supports that assertion. *Deveaux*, which was in any event overruled by *Letson*, seems to be applying not a "real party to the controversy" test, but rather the principle that for jurisdictional purposes the corporation has no substance, and merely "represents" its shareholders, see 5 Cranch, at 90-91; but even if it can be regarded as applying a "real party to the controversy" test, it deems that test to be met by *all* the shareholders of the corporation, without regard to their "control over the operation of the business." *Marshall*, which as we have discussed re-rationalized *Letson's* holding that a corporation was a "citizen" in its own right, contains language quite clearly adopting a "real party to the controversy" approach, and arguably even adopting a "control" test for that status. "[T]he court . . . will look behind the corporate or collective name . . . to find the persons who act *as the representatives, curators, or trustees*. . . . " 16 How., at 328-329 (emphasis added). "The presumption arising from the habitat of a corporation in the place of its creation [is] conclusive as to the residence or citizenship *of those who use the corporate name and exercise the faculties conferred by it*. . . . " *Id.* at 329 (emphasis added).) But as we have also discussed, and as the last quotation shows, that analysis was a complete fiction; the real citizenship of the shareholders (or the

controlling shareholders) was not consulted at all.[3] From the fictional *Marshall*, the dissent must leap almost a century and a third to *Navarro* to find a "real party to the controversy" analysis that discusses "control." That case, as we have said, is irrelevant, since it involved not a juridical person but the distinctive common-law institution of trustees.

The dissent finds its position supported, rather than contradicted, by the trilogy of *Chapman*, *Great Southern*, and *Bouligny* – cases that did involve juridical persons but that did not apply "real party to the controversy" analysis, much less a "control" test as the criterion for that status. In those cases, the dissent explains, "the members of each association held equivalent power and control over the associations' assets, business, and litigation." *Post*, at 5. It seeks to establish this factual matter, however, not from the text of the opinions (where not the slightest discussion of the point appears) but, for *Chapman*, by citation of scholarly commentary dealing with the general characteristics of joint stock company agreements, with no reference to (because the record does not contain) the particular agreement at issue in the case,

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[3] *Marshall's* fictional approach appears to have been abandoned. Later cases revert to the formulation of *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497 (1844), that the corporation has its own citizenship. See *Great Southern Fire Proof Hotel v. Jones*, 177 U.S. 449, 456 (1900) ("for purposes of jurisdiction . . . a corporation was to be deemed a citizen of the State creating it") (citing *Letson*); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) ("express company cannot be a *citizen* of New York, within the meaning of statutes regulating jurisdiction, unless it be a corporation").

post, at 5-6; for *Great Southern*, by citation of scholarly commentary dealing with general characteristics of Pennsylvania limited partnership associations, and citation of Pennsylvania statutes, *post*, at 6-7; and, for *Bouligny*, by nothing more than the observation that "[t]here was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern*, the Court was not called upon to decide" the issue, *post*, at 7. This will not do. Since diversity of citizenship is a jurisdictional requirement, the Court is always "called upon to decide" it. As the Court said in *Great Southern* itself:

> "[T]he failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit. . . . 'The rule . . . is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.' " 177 U.S., at 453 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

If, as the dissent contends, these three cases were applying a "real party to the controversy" test governed by "control" over the associations, so that the citizenship of all members would be consulted only if all members had equivalent control, it is inconceivable that the existence of equivalency, *or at least the absence of any reason to suspect nonequivalency*, would not have been mentioned in the

opinions. Given what 180 years of cases have said and done, as opposed to what they might have said, it is difficult to understand how the dissent can characterize as "newly formulated" the "rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purpose of diversity jurisdiction." *Post*, at 2.

In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of "all the members," *Chapman*, 129 U.S. at 682, "the several persons composing such association," *Great Southern*, 177 U.S., at 456, "each of its members," *Bouligny*, 382 U.S., at 146.

C

The resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization. But, as must be evident from our earlier discussion, that has been the character of our jurisprudence in this field after *Letson*. See Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968). Arkoma is undoubtedly correct that limited partnerships are functionally similar to "other types of organizations that have access to federal courts," and is perhaps correct that "[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment." Brief for

Respondent 33. Similar arguments were made in *Bouligny*. The District Court there had upheld removal because it could divine " 'no common sense reason for treating an unincorporated national labor union differently from a corporation,' " 382 U.S., at 146, and we recognized that that contention had "considerable merit," *id.*, at 150. We concluded, however, that "[w]hether unincorporated labor unions ought to assimilated to the state of corporations for diversity purposes," *id.*, at 153, is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court," *id.*, at 147. In other words, having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress.

Congress has not been idle. In 1958 it revised the rule established in *Letson*, providing that a corporation shall be deemed a citizen not only of its State of incorporation but also "of the State where it has its principal place of business." 28 U. S. C. A. § 1332(c) (Oct. 1989 Supp.) No provision was made for the treatment of artificial entities other than corporations, although the existence of many new, post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the the [sic] sort of Massachusetts business trust at issue in *Navarro*, must have been obvious.

Thus, the course we take today does not so much disregard the policy of accommodating our diversity

jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives. Such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word "citizen." The fifty States have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control. Which of them is entitled to be considered a "citizen" for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning, and questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction. We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.

III

Arkoma argues that even if this Court finds complete diversity lacking with respect to Carden and Limes, we should nonetheless affirm the judgment with respect to Magee because complete diversity indisputably exists between Magee and Arkoma. This question was not considered by the Court of Appeals. We decline to decide it in the first instance, and leave it to be resolved by the Court of Appeals on remand.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 88-1476

C. T. CARDEN, ET AL., PETITIONERS *v.*
ARKOMA ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 27, 1990]

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The only potentially nondiverse party in this case is a limited partner. All other parties, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse. Thus, the Court has before it a single question – whether the citizenship of a limited partner must be counted for purposes of diversity jurisdiction. The Court first addresses whether the limited partnership is a "citizen." I do not consider that issue, because even if we were to hold that a limited partnership is a citizen, we are still required to consider which, if any, of the other citizens before the Court as members of Arkoma Associates are real parties to the controversy, *i.e.*, which parties have control over the subject of and litigation over the controversy. See *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 328 (1854). Application of that test leads me to conclude that limited partners are not real parties to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction.

I

The Court asserts that "[w]e have long since decided" to leave to Congress the issue of the proper treatment of unincorporated associations for diversity purposes, because the issue of which business association "is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning." *Ante*, at 12. That assertion is insupportable in light of *Navarro Savings Assn. v. Lee*, 446 U. S. 458 (1980) (determination of which members of unincorporated business trust must be considered for purposes of diversity jurisdiction) and even *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965) (determination of proper treatment of union for diversity jurisdiction purposes according to settled law; Congress has power to change result), on which the court relies. *Ante*, at 11. Indeed, the Court in this case does not leave the issue to Congress, but rather decides the issue and then invokes deference to Congress to justify its newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction. In my view, the Court properly tackles the issue, because "application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function." Currie, Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968); see also *Bank of United States v. Deveaux*, 5 Cranch 61, 87 (1809) ("The duties of this [C]ourt, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and

the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws").

II

The starting point for any analysis of who must be counted for purposes of diversity jurisdiction is *Strawbridge v. Curtiss*, 3 Cranch 267 (1806), in which the Court held that "complete diversity" is required among "citizens" of different States. Complete diversity, however, is not constitutionally mandated. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U. S. 523, 530-531 (1967) (statutory interpleader need not satisfy complete diversity requirement as long as there is diversity between two or more claimants); see also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1301(b)(2), supporting Memorandum A, pp. 426-436 (1969). For example, in a class action authorized pursuant to Federal Rule of Civil Procedure 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the class would destroy complete diversity or to the class members' particular stake in the controversy. See *Snyder v. Harris*, 394 U. S. 332, 340 (1969); C. Wright, Law of Federal Courts 314-315 (2d ed. 1970); see also *Owen Equipment & Erection Co. v. Kroger*, 437 U. S. 365, 375, and n. 18 (1978) (citizenship of parties joined under ancillary jurisdiction not taken into account for purposes of determining diversity jurisdiction); Wright, *supra*, at 19 (same).

Since the early 19th century, one of the benchmarks for determining whether a particular party among those involved in the litigation must be counted for purposes of diversity jurisdiction has been whether the party has a "real interest" in the suit or, in other words, is a "real party" to the controversy. See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, p. 711 (1971) (well settled "citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism"). See generally Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247-250 (1978). In *Wormley v. Wormley*, 8 Wheat. 421 (1823), for example, the Court stated:

> "This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others." *Id.* at 451 (footnote omitted).

See also *Wood v. Davis*, 18 How. 467, 469 (1856) ("It has been repeatedly decided by this [C]ourt, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction . . . ").

The real party to the controversy approach has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations. In the Court's first examination of the corporate form to determine who must be counted for purposes of diversity jurisdiction, the Court

invoked the real party to the controversy test and concluded that the citizenship of each shareholder must be counted for purposes of diversity jurisdiction. *Bank of United States v. Deveaux*, 5 Cranch, at 91-92. In *Deveaux*, the Court recognized that corporations had been considered as possessing "corporeal qualities." *id.*, at 89, but concluded that the actual parties to the controversy were "the members of the corporation . . . who come into court, in this case, under their corporate name." *Id.*, at 91. By 1854, the Court no longer characterized the corporation as merely possessing "corporeal qualities," but rather as a "juridical person," which made an even stronger case for recognizing a corporation as a proper party in its own right before the Court. See *Marshall v. Baltimore & Ohio R. Co.*, 16 How., at 328; see also *Louisville, Cincinnati & Charleston R. Co. v. Letson*, 2 How. 497, 558-559 (1844) (corporation is a person; shareholders' citizenship will not be counted).

In *Marshall*, as in *Deveaux*, however, the determination whether the corporation was a citizen did not signal the end of the diversity jurisdiction inquiry. 16 How., at 328. Rather, the Court engaged in a two-part inquiry: (1) is the corporation a "juridical person" which can serve as a real party to the controversy, see *id.*, at 327-329; and (2) are the shareholders real parties to the controversy. See *id.*, at 328. To determine whether the corporation or the shareholders were real parties to the controversy, the Court considered which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation. The corporation, as the representative body of the

shareholders, itself had such power. The shareholders did not.

> "[F]or all the purposes of acting, contracting, and judicial remedy, [shareholders] can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. . . . [T]hey are not really parties to the suit or controversy." *Ibid.*

Having concluded that the shareholders were not the real parties to the controversy, the Court held that only the state of incorporation of the corporate entity need to be counted for purposes of diversity jurisdiction and that the citizenship of the shareholders would be presumed to be that of the state of incorporation. *Id.*, at 328-329. As the Court makes plain in *Marshall*, consideration of whether the shareholders were real parties to the controversy was a necessary prerequisite to the creation of the legal fiction that their citizenship would be deemed that of the corporation.

In a series of three cases considering the citizenship of business associations following *Marshall*, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy because the business associations were not citizens themselves and the members of each association held equivalent power and control over the association's assets, business, and litigation. In *Chapman v. Barney*, 129 U. S. 677 (1889), the Court addressed the issue whether a joint stock company was a citizen for purposes of diversity jurisdiction. A joint stock company, now a historical anomaly, see A.

Bromberg, Crane and Bromberg on Partnership 178, and n. 16 (1968), had several features of the corporate form, *e.g.*, centralized management and transferability of shares, but was more like a general partnership in that each partner was personally liable and there was only one class of partners. See Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384, 389, and n. 32 (1978). Each "partner" had equal power over the conduct of the business by virtue of his power to elect and control the company's managers. Bromberg, *supra*, at 179, n. 19. The Court held that a joint stock company was a "mere partnership" and therefore not sufficiently similar to a corporation to justify designating it as a citizen. 129 U. S., at 682. Hence, the citizenship of each owner had to be counted for purposes of diversity jurisdiction. Because the joint stock company owners were similarly situated in terms of power and control over the company, possessed all of the power that could be exercised over the company's business and litigation, and the company itself was not a citizen, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy.

The Court applied a similar approach in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449 (1900), when it examined a limited partnership association. Quite unlike the modern limited partnership, the limited partnership association at issue in *Great Southern*, recognized by very few states, Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36, was a species of business association involving a single class of partners with limited liability who exercised control over the operation of the business by annually electing the managers of the association. See, *e.g.*,

1874 Pa. Laws, Act. No. 153, §§ 2, 5; Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36. Not surprisingly, the Court viewed such an organization as more like a partnership than a corporation. See F. Burdick, Law of Partnership 361-362 (1899) (limited partnership association like corporation in some respects, but generally treated by the courts as a general partnership). As in the case of the joint stock company, because all partners were similarly situated in terms of power and control over the company, there was no reason for the Court to inquire who, among the partners, were the real parties to the controversy.

In *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965), the Court addressed whether a labor union could be treated as an entity for purposes of diversity jurisdiction. The Court held that a labor union is not a juridical person, and therefore, not a citizen for purposes of diversity jurisdiction. See *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 240-241 (CA5 1986) (union in *Bouligny* failed to meet party to controversy test). There was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern*, the Court was not called upon to decide which of the citizens before it were real parties to the controversy.

In the next case, in which application of the real party to the controversy test was appropriate, the Court unanimously applied it. See *Navarro Savings Assn. v. Lee*, 446 U. S. at 460, 464-465; *id.*, at 469, 475 (BLACKMAN, J., dissenting). In that case, the Court addressed the question whether the beneficiaries' citizenship must be counted when the trustees brought suit involving the assets of

the trust. See *id.*, at 458. Because the trust beneficiaries lacked both control over the conduct of the business and the ability to initiate or control the course of litigation, the Court held that the citizenship of the trust beneficiaries should not be counted. *Id.*, at 464-465.

As *Navarro* makes clear, the nature of the named party does not settle the question of who are the real parties to the controversy. In fact, if the Court's characterization of the issue before us were correct, *ante*, at 3, n. 1., then we seriously erred in *Navarro Savings Assn. v. Lee*, *supra*, at 464-466, when we considered whether the trust beneficiaries were the real parties to the controversy, in light of the fact that they were not named parties to the litigation.

The Court attempts to distinguish *Navarro* on the ground that it involved not a juridical person, but rather the "distinctive common-law institution of trustees." *Ante*, at 9. Such a view is consonant with the Court's new diversity jurisdiction analysis announced in this case, but fails to take into account the actual language and analysis in *Navarro*. If the nature of the institution of trustees was sufficient to answer the question of which parties to count for diversity jurisdiction purposes in that case, the Court's discussion of whether the trust beneficiaries were real parties to the controversy would have been wholly superfluous. Given that the Court granted certiorari in that case on the very issue whether the citizenship of trust beneficiaries must be counted, and then unanimously applied the real parties to the controversy test, the discussion clearly was not superfluous.

Application of the parties to the controversy test to the limited partnership yields the conclusion that limited partners should not be considered for purposes of diversity jurisdiction. Like the trust beneficiary in *Navarro*, the limited partner "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro, supra*, at 464-465. See Uniform Limited Partnership Act § 26, 6 U. L. A. 614 (1969) (limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership"); Uniform Limited Partnership Act § 1001, 6 U. L. A. 371 (Supp. 1989) (derivative actions); Ariz. Rev. Stat. Ann. § 29-324 (1989) (general partners of limited partnership have duties and obligations of partners to general partnership); § 29-209 (general partner is agent of partnership); § 29-356 (limited partners limited to derivative actions); Arkoma Associates Partnership Agreement, Art. VI, § 6.1 (general partners have "exclusive and complete control of the operations"); *id.*, § 7.1 (limited partners "shall not take any part in the control or management of . . . Partnership"). And like the shareholder in *Marshall*, "for all the purposes of acting, contracting, and judicial remedy, [limited partners] can speak, act, and plead, only through [others]." *Marshall*, 16 How., at 328. In fact, the limited partner has even less power in the limited partnership than the shareholder does in a corporation. "[T]he shareholder . . . retain[s] some measure of control over management through his voting power, while the more restricted role of the limited partner permits restraint [of management] only by his refusal to concur in certain acts

for which his consent is required by law." See Note, Standing of Limited Partners to Sue Derivatively, 65 Colum. L. Rev. 1463, 1478 (1965). Without the power to "control . . . the assets" or to initiate or "control the litigation," *Navarro, supra,* at 465, the limited partner is not a real party to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction. Because the majority of States has adopted the Uniform Limited Partnership Act, this rule would result in uniform treatment of limited partners for purposes of diversity jurisdiction. See Uniform Limited Partnership Act, 6 U. L. A. 172, 220 (Supp. 1989).

The commentators are in agreement that the party to the controversy test is the appropriate test to be applied to determine diversity jurisdiction with respect to limited partnerships and that the citizenship of limited partners should not be counted. See, *e.g.*, Comment, 45 U. Chi. L. Rev., at 418 (citizenship of limited partners should not be counted for purposes of diversity jurisdiction); Note, Who Are the Real Parties In Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?, 61 Wash. U. L. Q. 1051, 1066-1067 (1984) (same); Note, 56 Texas L. Rev., at 250-251 (real party in interest test should be applied to unincorporated business associations to determine whom to count for diversity); see also *Colonial Reality Corp. v. Bache & Co.*, 358 F.2d 178, 183 (1966) (Friendly, J.) (citizenship of limited partner should not be counted where state law declares partner is not "proper party to proceedings by or against a partnership").

The concern perhaps implicit in the Court's holding today is that failure to consider the citizenship of all the

members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened. This concern is more illusory than real in the context of unincorporated business associations. For, despite the Court's holding today, unincorporated associations may gain access to the federal courts by bringing or defending suit as a Rule 23 class action, in which case the citizenship of the members of the class would not be considered. See Federal Diversity Jurisdiction – Citizenship for Unincorporated Associations, 19 Vand. L. Rev. 984, 991-992 (1966). Thus, I see little reason to depart in this case from our long settled practice of applying the real parties to the controversy test.

Because there is complete diversity between petitioners and the limited partnership (assuming that it should be considered a citizen) and each of the general partners, the issue presented by this case is fully resolved by application of the parties to the controversy test.

III.

Even though the case does not directly relate to the issue before us, the Court takes pains to address and distinguish *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). See *ante*, at 4-5. The issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico on the ground that no party on one side was a citizen of or domiciled in Puerto Rico. See 288 U. S., at 478. None of the partners were citizens of Puerto Rico, but the Court

determined that the *sociedad* was and, therefore, removal was precluded. Thus, *Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction.

In any event, the Court's attempt to distinguish *Russell* are seriously flawed. In *Russell*, the Court examined the Puerto Rican *sociedad en comandita*, which is the civil law version of the modern limited partnership. The Court delineated a series of factors and concluded that, under civil law, the *sociedad* was a "juridical person." *Id.*, at 481. Ironically, the Court in this case endorses the holding of *Russell*, despite the fact that virtually all of the factors listed are equally applicable to the modern limited partnership. The Court fails to acknowledge that our modern limited partnership, like the *sociedad*, finds its origins in the civil law. The limited partnership originated in Europe in the middle ages, first appearing in France "[u]nder the name of *la Société en comandite*, . . . mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier." *Ames v. Downing*, 1 Bradf. Surr. 321, 329 (N. Y. 1850). The limited partnership did not find acceptance in the United Kingdom and was not a creature of the common law. F. Burdick, Law of Partnership 384-385 (2d ed. 1906). It was first introduced into this country in Louisiana and then New York. See Note, 65 Column. L. Rev., at 1464. Although a " 'creation of the civil law,' " the Puerto Rican *sociedad* was hardly " 'exotic.' " *Ante*, at 4 (quoting *Bouligny*, 382 U. S. at 151). Rather, it is yet one of many forms of the limited partnership descended from the ancient French *Societe* as is the

modern limited partnership adopted in this country. See *Ames, supra,* at 329-330 (American limited "partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood and regulated"). It is hardly an answer to the history of the limited partnership in this country and abroad to assert that it appears 25 years after *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965) See *ante,* at 6, n. 2. The "admirable consistency of our jurisprudence," *ante,* at 4, is not blemished by distinguishing between unions and limited partnerships. It is, however, severely marred by holding that an association within the continental United States is not afforded the same treatment as its virtually identical Puerto Rican counterpart. See also *ante,* at 6, n. 2 ("operative word in both the diversity statute and the removal statute at issue in *Russell* is 'citizens' "). The Court's decision today, endorsing treatment of a Puerto Rican business association as an entity while refusing to treat as an entity its virtually identical stateside counterpart, is justified neither by our precedents nor by historical and commercial realities.

For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-9201

USDA #CA 85-2295 D

ARKOMA ASSOCIATES,

Plaintiff-Respondent,

versus

C. TOM CARDEN and LEONARD L. LIMES,

Defendants-Petitioners.

Petition for Leave to Appeal an Interlocutory Order

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

On June 12, 1986, this Court directed that the petition of C. Tom Carden and Leonard L. Limes for leave to appeal an interlocutory order denying their motion to dismiss Arkoma Associates' action for lack of diversity jurisdiction be held in abeyance pending this Court's decision in 86-3128, Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation. On August 18, 1986, this Court decided *Mesa Operating Limited Partnership*, holding that the citizenship of a limited partnership is determined by the citizenship of the general partners. ___ F.2d ___ (5th Cir., August 18, 1986, no. 86-3128, slip p. 9121). Based on that decision, we conclude that the petitioners have failed to establish that an appeal of the interlocutory order would materially advance the ultimate termination of the litigation as required by 28 U.S.C.

§ 1292(b). Accordingly, IT IS ORDERED that the petition is DENIED.

Appeals from the United States District Court
for the Eastern District of Louisiana
(87-3624)
(87-3917)

(December 7, 1988)

Before POLITZ, and JOHNSON, Circuit Judges, and Boyle,* District Judge.

POLITZ, Circuit Judge:**

In these consolidated appeals Magee Drilling Company (MDC), C. Tom Carden, and Leonard L. Limes challenge the judgments in favor of Arkoma Associates, a partnership, rendered July 27, 1987 and September 17, 1987. Finding no reversible error, we affirm.

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* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

This litigation arises out of Arkoma's lease of two drilling rigs to MDC, a Texas corporation. MDC maintains that it was interested in buying or leasing two rigs capable of drilling to 7,500 feet. Discussions ensued between representatives of Arkoma and MDC. Arkoma avers that it made no representations as to drilling capacity and it gave MDC ample opportunity to inspect the rigs. MDC contends that Arkoma represented that the rigs were capable of drilling to 7,500 feet and that the principal rig components consisted of new or rebuilt parts.

On June 27, 1984 the parties executed a lease agreement which expressly declared that no warranties were given. Don Magee, president of MDC and an experienced oil and gas operative, signed the lease and initialed each page on an attached rig inventory list. Carden and Limes, also experienced oil men, joined Magee in personally guaranteeing the drilling company's obligations under the lease.

MDC employees inspected the rig equipment and supervised its transportation from Oklahoma to Texas. Upon arrival, damaged and missing parts and the wrong drill pipe were discovered, and the parties amended the lease to give MDC a credit of $45,000 and other concessions.

MDC used the rigs for over five months and drilled 19 wells. MDC contends that the rigs were defective and incapable of drilling to 7,500, and that Arkoma knew of these defects. Arkoma counters that there is no evidence that the rigs could not drill to 7,500 feet because of

defective equipment, that no unusual problems were encounted [sic], and that MDC made no complaints until December 1984 when it tried to repudiate the lease.

On December 28, 1984 MDC notified Arkoma that it could no longer honor its obligations to its creditors. An attempt at compromise was unsuccessful and the following month MDC tendered the rigs to Arkoma. Arkoma accepted physical possession to protect its rigs from damage; however, it reserved its rights under the lease. MDC failed to make the February 1985 payment and Arkoma gave notice of default and accelerated the lease payments. Suit was then filed against Carden and Limes as MDC's guarantors.[1]

Carden and Limes, both Louisiana citizens, moved to dismiss for lack of diversity jurisdiction, contending that one of the partners of Arkoma was also a Louisiana citizen. The district court denied that motion but certified the jurisdictional question. We declined to accept the interlocutory appeal. Carden and Limes counterclaimed and MDC intervened, claiming violations of the Texas Deceptive Trade Practices Act.

Following a bench trial the court awarded Arkoma judgment in the amount of $467,806.25 plus interest and attorney's fees. The counterclaim and intervention were rejected. Carden, Limes, and MDC appeal.

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[1] It is not clear from the record why Don Magee was not included as a party-defendant.

Analysis

1. Jurisdiction

The threshold issue raised on appeal is whether Arkoma properly invoked diversity jurisdiction. As found by the trial court and uncontested on appeal, two of Arkoma's general partners are citizens of Arizona and the other two are citizens of Oklahoma. One partner – claimed by Arkoma to be a limited partner – is a citizen of Louisiana, as are Carden and Limes.

The citizenship of a general partnership is determined by the citizenship of all the partners. If Arkoma is a general partnership, complete diversity of citizenship between the parties-plaintiff and parties-defendant does not exist. On the other hand, if Arkoma is a limited partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. *See Navarro Savings Association v. Lee*, 446 U.S. 458 (1980); *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Crop.*, [sic] 797 F.2d 238 (5th Cir. 1986).

The district court found that Arkoma, organized under the laws of Arizona, was a limited partnership under the laws of that state. The district court noted that while Arkoma did not comply with all of the requirements of Arizona Revised Statutes Section 29-302,[2] it had,

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[2] Section 29-302 of the Arizona Revised Statutes provides, in pertinent part:

A. Two or more persons desiring to form a limited partnership shall:

(Continued on following page)

"in good faith, substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law."

(Continued from previous page)

1. Sign and acknowledge a certificate, which shall state:

   (a) The name of partnership.

   (b) The character of the business.

   (c) The location of the principal place of business.

   (d) The name and place of residence of each member; general and limited partners being respectively designated.

   (e) The term for which the partnership is to exist.

   (f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

   . . .

   (i) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.

   [Subsection (j), (k), (l), (m), and (n) relate to various rights of limited partners.]

2. File for record the certificate in the office of county recorder of the county in which the principal place of business is situated.

(Continued on following page)

Appellants maintain that the district court erred in finding that Arkoma was a limited partnership because of its "substantial compliance" with Arizona law. The record reflects that Arkoma's certificate of partnership was filed with the recorder's office in Maricopa County, Arizona on September 1, 1981. An amended limited partnership agreement was filed with the office of the Arizona Secretary of State on September 10, 1982. A second certificate of amendment was filed after the instant suit was initiated. The limited partnership agreement describes the name, place of business and purpose of the partnership, the names of the four general partners, the capital contribution of the general and limited partners, the division of profits and losses between the general and limited partners, and the rights of the limited partners. The names and addresses of the limited partners were not listed.

To the extent that the district court's finding of substantial compliance is a finding of fact, it is not clearly erroneous; to the extent it is a conslusion [sic] of law it is not in error. Thus, the juristictional [sic] challenge falters. Our recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.* is dispositive. It rejects the arguments advanced by appellants. We find the requisite federal jurisdiction.

(Continued from previous page)

Effective July 24, 1982, section 29-302 was reenacted as section 29-308. A significant change required the filing of certificates of partnership with the Arizona Secretary of State.

2. Viability of lease and guaranty agreements

MDC, Carden, and Limes vigorously contend that the lease and guaranty agreements were vitiated by Arkoma's fraud and nondisclosures. This challenge founders on the shoals of Fed.R.Civ.P. 52(a), which directs that findings of fact by the trial court are to be accepted unless shown to be clearly erroneous.

The trial court found: that Arkoma made "no material representations or omissions as to the quality, capacity or performance of the land drilling rigs"; that Magee and another MDC representative, Joe Claus, had an opportunity to inspect the rigs before the lease was signed; that Claus thoroughly inventoried the rigs prior to the signing; that MDC transported the rigs from Oklahoma to Texas; that after their arrival in Texas, the rigs were inspected and the parties settled a dispute over inappropriate pipe and missing and damaged components by giving MDC a substantial credit; and that 19 wells were drilled in the five months after delivery without any complaint from any MDC representative of Cardin, Limes, or Magee. It is too firmly established to require citation that a finding of fact may not be characterized as clearly erroneous unless the reviewing court has a definite and firm conviction that an error has been committed. Reviewing the trial court's finding in light of the evidence presented, and giving due weight to credibility assessments, we come to no such firm conviction.

3. Surrender of the rigs

MDC, Carden, and Limes argue that Arkoma voluntarily terminated the lease when it accepted physical

possession of the rigs in January, contending that Arkoma cannot both take possession of the property and enforce an accelerated rent provision. Appellants misconstrue Texas law.

Texas law provides that a lessor may repossess leased property and yet recover future rental payments due under the lease. *Robinson v. Granite Equipment Leasing Corp.*, 553 S.W.2d 633 (Tex.Civ.App. 1977) (*writ ref'd n.r.e.*). Future rentals in compensation for damages may be recovered; a pure penalty as such may not. MDC, Carden, and Limes invite our attention to *Stewart v. Basey*, 150 Tex. 666, 245 S.E.2d 484 (1952). We find it inapposite. *Basey* involved a stipulated damages provision which the court found to be a pure penalty because it was not related to the actual damages suffered. In *Basey* the lessor repossessed the property, accelerated future rentals, and relet the property without giving the prior lessee credit against future rentals. That is not the situation at bar where there was no reletting of the drilling rigs, although Arkoma attempted to do so. The recovery granted is appropriate because the accelerated rentals accurately represent Arkoma's true loss of rentals.

4. Texas Deceptive Trade Practices claim

This issue need not long detain us. The trial court found that Arkoma did not misrepresent, either by representations of failures to disclose, "the quality, capacity of performance" of their two rigs. We have gauged that finding not clearly erroneous. Absent that factual basis, the claims under the DTPA lack vitality.

Finding no clearly erroneous finding of fact or error of law in the decisions of the district court, its judgments are AFFIRMED in all respects.

ARKOMA ASSOCIATES, Plaintiff-Counter Defendant-Appellee,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants,

and

MAGEE DRILLING COMPANY, INC., Intervenor-Counter Plaintiff-Appellant,

v.

David HEPBURN, et al., Third Party Defendants-Appellees.

ARKOMA ASSOCIATES, Plaintiff-Appellee, Cross-Appellant,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants, Cross-Appellee,

and

Magee Drilling Company, Intervenor-Appellant, Cross-Appellee.

Nos. 87-3624, 87-3917.

United States Court of Appeals, Fifth Circuit.

June 26, 1990.

Appeals from the United States District Court for the Eastern District of Louisiana.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

This matter is now before us on remand from the Supreme Court.

Invoking diversity jurisdiction Arkoma Associates, a partnership organized under the laws of Arizona, sued C. Tom Carden and Leonard L. Limes, citizens of Louisiana, as guarantors of an agreement by which Arkoma leased certain drilling equipment to Magee Drilling Company, Inc. (MDC). Carden and Limes counterclaimed. MDC, a Texas corporation with its principal place of business in Texas, intervened, urging claims against Arkoma for violation of the Texas Deceptive Trade Practices Act.

Carden and Limes sought dismissal for lack of diversity jurisdiction because a limited partner of Arkoma was a fellow Louisianian. The district court rejected this jurisdictional challenge and after a bench trial awarded judgment to Arkoma and rejected MDC's claims. Carden, Limes, and MDC appealed. We affirmed. *Arkoma Associates v. Carden*, 874 F.2d 226 (5th Cir.1988). The Supreme Court granted certiorari. Holding that the citizenship of a limited partner was relevant in the diversity jurisdiction

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* District Judge, of the Eastern District of Louisiana, sitting by designation.

equation, the Supreme Court directed dismissal of Arkoma's claim against Carden and Limes for lack of jurisdiction. The Court remanded to us the issue presented by the judgment dismissing the claims of MDC. *Carden v. Arkoma Associates*, 494 U.S. ___, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990).

On remand, MDC maintains that the district court lacked jurisdiction over its demands in intervention because the court lacked jurisdiction over the main demand. MDC's claims, however, have an independent jurisdictional basis, discrete from that of the main demand. It is undisputed that no partner of Arkoma resides in Texas. Accordingly, there is complete diversity between Arkoma and MDC. Further, MDC's claim in intervention exceeds the jurisdictional minimum. Thus, all requisites for diversity jurisdiction under 28 U.S.C. § 1332 are satisfied.

When a separate and independent jurisdictional basis exists a federal court has the discretion to treat an intervention as a separate action, and may adjudicate it despite dismissal of the main demand if failure to do so might result in unnecessary delay or other prejudice. *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685 (5th Cir.1954); *Atkins v. State Board of Education of North Carolina*, 418 F.2d 874 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323 (3rd Cir.1965); *cf. Simmons v. Interstate Commerce Commissions*, 716 F.2d 40 (D.C.Cir. 1983); *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir.1982). Such necessarily is the situation at bar where the trial court has adjudicated MDC's claim and this court has affirmed. We perceive no basis

for a reconsideration of our affirmation nor can we conceive of any purpose to be served by a remand of MDC's claims to the district court. Further, a dismissal of MDC's claims without prejudice would result only in further delay and expense to the parties and a cavalier waste of increasingly limited judicial resources, both trial and appellate.

For these reasons, the judgment of the district court rejecting the demands of MDC against Arkoma is AFFIRMED; and the judgment of the district court as it relates to the claims of Arkoma and the counterclaims of Carden and Limes is VACATED for lack of jurisdiction, and those claims are dismissed without prejudice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 87-3624
87-3917

ARKOMA ASSOCIATES, Plaintiff-Counter Defendant-Appellee,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants,

and

MAGEE DRILLING COMPANY, INC., Intervenor-Counter Plaintiff-Appellant,

v.

David HEPBURN, et al., Third Party Defendants-Appellees.

ARKOMA ASSOCIATES, Plaintiff-Appellee, Cross-Appellant,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants, Cross-Appellee,

and

Magee Drilling Company, Intervenor-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6-26-90, 5 Cir., 198___, ___F.2d___

(July 23, 1990)

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

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* District Judge, of the Eastern District of Louisiana, sitting by designation.

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
* * * * * * * * *	*	MAG. DIV. 4

NOTICE OF MOTION TO INTERVENE

TO: Arkoma Associates
through Mitchell J. Hoffman, Esq.
4040 One Shell Square
New Orleans, LA 70139

PLEASE TAKE NOTICE that Magee Drilling Company will bring the attached motion to intervene for hearing on January 15, 1986 at 9:00 a.m. or as soon thereafter as counsel can be heard.

Respectfully submitted,

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for Magee Drilling Company
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703

By:/s/ Richard K. Ingolia
Richard K. Ingolia

/s/ Joseph M. Perry, Jr.
JOSEPH M. PERRY, JR.
Co-Counsel for Magee Drilling Company
3850 North Causeway Blvd.
Metairie, LA 70002
Telephone: 504/831-9951

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing the same in the U.S. Mail, postage prepaid, this 31st day of December, 1985.

/s/ Richard K. Ingolia
Richard K. Ingolia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D", MAG. 4

MOTION TO INTERVENE AS A DEFENDANT

Magee Drilling Company, a Texas Corporation, moves the Court for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its

proposed answer and to assert the claims contained in its counterclaim, on which copies are hereto attached as Exhibit "A", on the ground that it is the lessee in the lease which plaintiff seeks to enforce, and as such has a defense to plaintiff's claim, and certain rights which it is entitled to enforce which present both questions of law and fact which are common to the main action.

IT IS ORDERED that Magee Drilling Company be and it is hereby granted leave to file the intervention attached hereto as Exhibit "A".

New Orleans, Louisiana this ___ day of December, 1985.

UNITED STATES DISTRICT JUDGE

Respectfully submitted,

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for Magee Drilling Co.
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112

Telephone: 504/525-7703

By:/s/ Richard K. Ingolia
Richard K. Ingolia
/s/ Joseph M. Perry, Jr.
JOSEPH M. PERRY, JR.
Co-Counsel for Magee Drilling Co.
3850 North Causeway Boulevard
Metairie, LA 70002
Telephone: 504/831-9951

APPENDIX C

Rule 4. Process

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) Service.

(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph,

be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only –

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule –

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment confirming substantially to form 18-A and a return envelope, postage prepaid, addressed

to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

(d) **Summons and Complaint: Person to be Served.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an

agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of the state for the service of summons or other like process upon any such defendant.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the

circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be serviced at the same places. A subpoena may be serviced within the territorial limits provided in Rule 45.

(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L. 97-462, § 2, Jan. 12, 1983, 96 Stat. 2527; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff, compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena – Time for Answer).